In the Supreme Court of the United States.

OCTOBER TERM, 1921.

OSCAR LESER ET AL.
v.
J. MERCER GARNETT ET AL. } No. 553.

ON WRIT OF ERROR AND PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

BRIEF FOR THE UNITED STATES AS AMICUS CURIÆ.

The Solicitor General, on behalf of the United States, moves the Court to permit the Government to file this brief as *amicus curiae* in the above-entitled case.

It is not necessary to suggest the interest that the United States has in the controversy, for it concerns the action of the political branch of the Federal Government in proposing an amendment to the Constitution and in subsequently promulgating the fact that such amendment had been duly ratified by the requisite number of States. Should this Court reverse the decision of the Court of Appeals of Maryland and sustain the contentions of the learned counsel for the appellant that the Nineteenth Amend-

ment is not a part of the Constitution, such position would concern not merely the immediate litigants but the whole people of the United States.

I have already set forth in my brief in *Fairchild* v. *Hughes* (Docket No. 148) the views of the Government with respect to the contentions of the learned counsel for the appellant in the instant case, and as the two cases will be heard at the same time, it will not be necessary for me to restate the arguments submitted in the *Fairchild* brief.

I recognize that there are two important differences between the two cases, which will make the first two points of my brief in the *Fairchild* case inapplicable to the instant case. In that brief I argued (pages 5–13) that the plaintiff did not have a sufficient status with respect to the controversy to make his bill in equity a "case" under the judiciary article of the Constitution; and I further argued that, inasmuch as the bill in equity in that case was to restrain the Secretary of State from promulgating the ratification of the Nineteenth Amendment, and as, after the dismissal of the case in the Court below, the Secretary of State *had* made the proclamation, the point at issue in that case was now moot.

In the instant case the question arises in a different way, and the question whether the Court of Common Pleas of Maryland properly refused to strike from the registry lists the names of the two women, who were registered as voters, seems to me to present a concrete "case" within the meaning of the Judiciary Article, and the only question therefore involved in

the instant case is whether, under the Nineteenth Amendment, the two women were properly registered as voters.

The question, therefore, as to the validity of the Nineteenth Amendment and the method of its adoption—if, indeed, it be longer open to judicial controversy—seems to be justiciably presented by the record in this case.

I believe that in my brief in the case of *Fairchild* v. *Hughes* I have anticipated the main contentions advanced in behalf of the Appellants in the instant case, and to avoid useless repetition of printed matter I respectfully ask that my brief in the case of *Fairchild* v. *Hughes*, especially the portions between pages 13 and 36, may be regarded as my brief as *amicus curiae* in the instant case.

I did not discuss in the brief in the *Fairchild* case the peculiar construction which counsel for the appellants in the instant case gives to the clause of Article V of the Constitution which refers to "equal suffrage in the Senate." I had supposed—and I have never until this controversy heard or read any contention to the contrary—that all that the framers of the Constitution meant when they provided that—

> No State, without its consent, shall be deprived of its equal suffrage in the Senate—

was that, while the membership in the House of Representatives should be proportionate to population, each State—large or small—should be entitled

to the same number of representatives in the Senate. There is nothing in the debates in the Constitutional Convention that would indicate that the framers of the Constitution had in mind the character of the electorate, which should select the State legislatures, who, in turn, should select the Senators in behalf of the States. Since the Constitution was adopted the election of Senators has been taken from the State legislatures; but the fact that the people now themselves directly select the Senators, if it have any application to the validity of the Nineteenth Amendment, sustains such validity; for if the people of the United States, through the process of amendment, may provide that the people of the States shall themselves select their representatives in the Senate, there is an added reason why the power of amendment should be broad enough to provide, with respect to the question of discriminations between the sexes in suffrage, that there should be a uniform rule.

While it seems unnecessary to amplify my argument in *Fairchild* v. *Hughes*, yet two additional suggestions occur to me, which I respectfully submit to the Court.

I.

I desire, in the first place, to suggest the question whether, when the political department of the Government has proposed an amendment and three-fourths of the States have certified to the fact that they have adopted it, the Constitution ever intended to confer upon the judiciary the power to sit in judg-

ment upon such concurrent action of States and Nation which, in its essence, is political in character. Unquestionably the Constitution expressly delegates to the Federal judiciary the power to sit in judgment upon the law, or even the constitution of a State when either discloses an indubitable repugnancy to the Federal Constitution. Unquestionably also it is a general and vital implication of the Constitution, while not so expressly provided, that the judiciary, as the balance wheel of the Constitution, can pass upon the validity of acts of the coordinate branches of the Government—the Legislative and the Executive—which are repugnant to the Constitution.

But does it follow that when the Nation and the States, as political entities, determine to amend the Constitution under the powers vested in them by Article V, the judiciary has been given a power to pass upon these political acts which are, in their nature, outside of the ordinary workings of the Government?

Suppose that, on the request of two-thirds of the States, the Government should call a general convention to amend the Constitution, and that convention should meet. It would represent the people, in whom the residuum of all political powers remains. Can it be that this court—which is but one department of the Government—could pass upon the validity of the acts of the general convention, which, pursuant to call authorized by the Constitution, had made and recommended changes to the Constitution? To impose this duty upon the judiciary would be a

long step in advance of anything that was decided by this court in *Marbury* v. *Madison*.

In that connection, let me quote what James Wilson so well said in the Pennsylvania Convention of 1788:

> Perhaps some politician who has not considered with sufficient accuracy our political system would observe that, in our Governments, the supreme power was vested in the Constitution. This opinion approaches the truth; but it does not reach it. The truth is that, in our governments, the supreme, absolute, and uncontrollable power remains in the people. As our constitutions are superior to our legislatures, so the people are superior to our constitutions.

If, then, such a general convention should meet, it would represent, in a peculiar sense, the people in their primary capacity, who, viewing our Constitution not subjectively but objectively, would determine to what extent, if any, they wished to modify it. I gravely question whether such a convention, duly called in accordance with the Constitution, could be subjected, as to its political acts, to the supervision of the judiciary. In other words, the situation would be in analogy to that upon which this court passed in *Luther* v. *Borden*, 7 Howard, 1, where there being two political bodies in Rhode Island, each claiming to be its true government, this Court held that it was beyond its power to review the action of the President in recognizing one and refusing to recognize the other. The action was deemed so peculiarly

political in its nature as to be—to use Madison's phrase—"extra judicial."

II.

The only other point which I desire to emphasize, in addition to my suggestions in the brief in *Fairchild v. Hughes*, is the fact that, in the practical workings of a constitution, questions, especially those of a political nature, are often determined by the practical construction which the people themselves place upon their constitution or upon laws. This was recognized by this Court very early in the history of the Government.

This Court had only commenced its sessions in 1790, when a question arose as to the validity of the Judiciary Act in naming the judges of the Supreme Court to be judges of the Circuit Courts. Chief Justice Jay and his associates made a formal protest to the President against this addition to their duties, on the ground that the law was unconstitutional. Pending the determination of the question, the judges did act as Circuit Judges under protest, and the question did not come, as a concrete case, before the court until 1803—thirteen years later. Marshall had succeeded Chief Justice Jay, and stated to his associates that he agreed with them as to the invalidity of the law which imposed upon the Supreme Court judges the duty of Circuit Judges; but the Court reached the conclusion that, in view of the acquiescence in the law for thirteen years, its validity must be assumed. (This statement is made on the

authority of Chancellor Kent in an article in 3 N. Y. Review, 347, published in 1838.)

In the practical workings of government, constitutions as well as laws are often determined by the practical construction which the people themselves place upon them, and this is peculiarly true in the instant case. The right of the people to amend their Constitution, so as to prevent any State from discriminating in the matter of suffrage on account of "race, color, or previous condition of servitude" has been acquiesced in by the American people for over fifty years. It is unquestionably the law of the land. All that the Nineteenth Amendment does, in substance, is to add the word "sex" to race, color, or previous servitude. Similarly with the Nineteenth Amendment, the American people thus put a practical construction upon the nature of their institutions, when, without a challenge in any part of the country, except in the instant case, millions of women voted on the assumption that, under the Nineteenth Amendment, such was their right. Considering the size of the electorate and its distribution over a vast country, it would be difficult to imagine a more general acquiescence by the American people in an essentially political act than was witnessed in the last Presidential election.

To invalidate the Nineteenth Amendment, on the ground that it exceeds the power of amendment under the Constitution, would necessarily mean that the Fifteenth Amendment was equally in excess of the Constitution. The acquiescence by the American

people in such power of amendment for over a half century has settled that question. To suggest that the enfranchisement of the negro race was the result of a great war, does not answer the question. That, when that war ended, an amendment was adopted to secure negro suffrage, and that, for more than half a century, its validity has never been judicially challenged, is beyond question. To attempt, at this late day, to deny such power of amendment is similar in kind, although differing in degree, to an attempt to set aside Magna Charta on the ground that King John acted under duress, or to set aside the whole Constitution of the United States on the ground that the Convention which adopted it acted—as it clearly did—in excess of its delegated authority.

I need not further argue the questions of law, so ably argued by the learned counsel for the appellant, for I have anticipated them in the *Fairchild* brief. Moreover, the very able briefs filed by the Attorney General of Maryland and by the counsel for the intervening petitioners, and the—as it seems to me—unanswerable argument in the very able opinion of the Court of Appeals of Maryland (114 Atl. 840), seem to make an argument in behalf of the United States superfluous.

JAMES M. BECK,
Solicitor General.

JANUARY 20, 1922.